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In the Supreme Court of the United States

OCTOBER TERM, 2004

TAREK H. JIFRY;
MAAN H. ZARIE

PETITIONERS,

v.

FEDERAL AVIATION ADMINISTRATION;
TRANSPORTATION SECURITY ADMINISTRATION; AND
NATIONAL TRANSPORTATION SAFETY BOARD

RESPONDENTS.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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ARGUMENT

In its Opposition, the Government embraces the holding of the Court below that non-citizens whose rights are adversely affected by Government action are not entitled to the core due process rights of notice and an opportunity to challenge the basis of the Government action before a neutral, independent decisionmaker.

These core due process rights were denied by the Government and the Court below. After almost two decades of service as pilots with untainted records, their airman certificates were revoked by the Federal Aviation Administration (FAA) because, for reasons unknown, the pilots were allegedly risks to U.S. national security.

The Government says that these pilots received all the "process" that they were "due" because the secret evidence claimed to support the charge was reviewed by a high official of the Transportation Security Administration and *in camera* by the Court below.

This Court established a balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine the level of due process which must be afforded. Petitioners believe that the Court in *Mathews* and its progeny was in no way dismissive of constitutional and administrative due process concerns. In that case, the Court was grappling with the difficult issue as to whether a full dress hearing with witnesses and live testimony was necessary as a core due process right which must be provided in every kind of administrative proceeding in this country. The Court, in some detail, set forth that the petitioner in that case was given the notice of the basis of the denial of petitioner's claim and the right to challenge the basis with evidence. The only question was whether a paper hearing on the record before an independent adjudicator sufficiently comported with due process. Balancing a number of factors, the Court held that a full dress hearing was not necessary and the petitioner in that case received the process that was due.

This Court has never held, and it is inconceivable that the Court would ever hold that a litigant, a citizen or not, receives "process that is due" where, as here, a pilot's license is revoked because he was determined to be a threat to national security by the Agency with no notice of the nature or basis for the claim and where the determination is based entirely on secret information.

I. This case raises an important question of due process.

This case raises the important question as to whether the U.S. Government may revoke a pilot's FAA-issued airman's certificate based solely upon classified evidence without notice and an opportunity to challenge the basis of the revocation. The Government says yes, if the pilot is a non-citizen, arguing that a non-citizen in a U.S. proceeding has no due process rights (notwithstanding the plain language of 49 U.S.C. § 44709 and its application to citizens and non-citizens alike).

Due process rights are meant to protect a person from being deprived of property or liberty mistakenly or unjustly in a U.S. proceeding, or over which the U.S. has jurisdiction. The Court has repeatedly described the essence of due process rights.

> 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and a meaningful manner.'

Hamdi v. Rumsfeld, 159 L. Ed. 2d 578, 601-602 (2004) (*quoting Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (other citations omitted)). The pilots in this case were denied these rights.

In its Opposition, the Government contends that because this is the first time that any pilots have been stripped of their certificates based upon a TSA threat assessment, this writ is premature. It is certainly not premature as to these pilots, whose careers and reputations have been destroyed by the FAA revocation.

On the contrary, the decision below establishes a precedent so sweeping in administrative law and administrative due process that administrative agencies will be empowered to adjudicate rights without notice and an opportunity to challenge the charge in a secret administrative proceeding on a secret administrative record, reminiscent of a Star Chamber.

The Government claims in its opposition that the petitioners as non-citizens have no property interest in their airmen certificates and therefore no due process rights to challenge the revocation. (Opposition at 12). This assertion is simply wrong.

In addition to the fact that the governing statute, 49 U.S.C. § 44709, expressly provides core due process rights to all pilots holding FAA airman certificates, citizen and non-citizen alike, courts have routinely held that individuals have a property interest in permits and licenses such as the certificates at issue in this case. *Illinois v. Batchelder*, 463 U.S. 1112, 1116 (1983); *Mackey v. Montryn*, 443 U.S. 55, 64 (1979); *Bell v. Burson*, 402 U.S. 535, 539 (1971).

The issue in this case centers on the FAA's authority to revoke airmen certificates pursuant to 49 U.S.C. § 44709(b). In its opposition, the Government mistakenly relies on those FAA regulations regarding the issuance of certificates. Opposition at 2-3. Repeatedly, the Government refers to pilots "obtaining" a certificate. ("Non-resident aliens have no legally protected interest in **obtaining** a pilot license from the FAA." Opposition at 12; "The fifth amendment does not protect the rights of aliens on foreign soil to **obtain** privileges..." Opposition at 14.) The standard for "obtaining" a certificate is not at issue in this case. The standard for issuing certificates is set out in 49 U.S.C. § 44703, whereas the statute for revoking certificates, in question in this case, is set out in 49 U.S.C. § 44709 augmented by the Administrative Procedure Act, 5 U.S.C. § § 553-559 (2000)(APA).

While the FAA, in the Government's view, may have what

the Government refers to as "sweeping discretion" in issuing a certificate, the statute does not provide similar discretion in revoking certificates. Once the FAA in its discretion has issued an airman certificate, due process rights attach to that interest and the FAA must afford a pilot due process rights before revoking his certificate under 49 U.S.C. § 44709.

The Government also is entirely dismissive of the consequences of the FAA action to the pilots and to an international agreement with Saudi Arabia. The Government acknowledges that the revocations in question will preclude the pilots from flying not only to the United States but within their home-country, Saudi Arabia, as well as between Saudi Arabia and other countries. Opposition at 13. The Government, however, states that "If foreign Governments choose to attach consequences to the regulatory actions of the United States Government, that is a matter for the petitioners to take up with the foreign governments." Opposition at 14.

This cavalier statement is short on facts. The Saudi pilot petitioners did not choose to obtain FAA certificates. No, because of the Government's international agreement with Saudi Arabia the only way that Saudi pilots can be certified is by the FAA. They obtained the certificates as a result of a Memorandum of Understanding that has existed for over twenty years between the Governments of the United States and Saudi Arabia.

In 1982, the Governments of the United States and Saudi Arabia entered into an agreement whereby the United States through the FAA agreed to undertake the issuance and inspection of airman certificates issued to Saudi pilots to operate Saudi Arabian registered aircraft. Since 1984, under an exemption specifically granted by the FAA to Saudi Arabian Airlines as a result of the Memorandum of Understanding between the two countries, the FAA certifies all Saudi pilots. This exemption has been actively renewed by the FAA every two years since 1984 and the FAA maintains an active presence in Saudi Arabia carrying out its duties under the

international agreement and the exemption.

The Government of Saudi Arabia by international agreement accepted the FAA expertise and experience in certifying and inspecting its pilots and agreed to the FAA process for suspending, amending and revoking certificates and the due process rights attendant to such actions. As the FAA is fully aware, the Saudi Presidency of Civil Aviation (PCA) does not independently issue airman certificates. For the U.S. Government, in the face of this international agreement in force for many years, to now state that this is a matter that the pilots should take up with the foreign government, ignores or simply misunderstands the contractual commitment of the United States in its agreement with Saudi Arabia. That commitment of the U.S. is to treat Saudi pilots like U.S. citizen pilots whose licenses may be revoked pursuant to 49 U.S.C. § 44709.

The Saudi pilots clearly possess property rights in the airman certificates and the FAA can not constitutionally strip the pilots of that property without affording them due process rights.

II. The decision below does create a split in the circuits.

Contrary to the Government's assertions, the decision in this case does conflict with the Ninth Circuit decision in *American-Arab Anti-Discrimination Comm. v. Reno* (*AAADC I*), 70 F.3d 1045 (9th Cir. 1995). The conflict is direct and sharp. The Ninth Circuit in *AAADC I*, applying the *Mathews* factors held that a court in its adjudications cannot rely solely on secret, classified evidence. In this case, the Court below did just that and upheld the revocation of the pilots' licenses solely on secret evidence on a secret administrative record, unprecedented in this country, as well as in the D.C. Circuit. See *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986) (Ruth Bader Ginsburg, J.) *aff'd* 484 U.S. 1 (1987) (*per curiam*). In fact, in none of the D.C. Circuit decisions cited in footnote 5 of the Government's Brief or in pages 18-19 of the Petitioner's Petition has the D.C. Circuit ever previously upheld an agency

finding or adjudication solely on secret classified evidence.[1]

The Government argues that there is no split because AADC I dealt with aliens who were physically present in the United States while in the case at hand the petitioners are non-resident aliens who are not physically present within the United States. The holding of the Ninth Circuit was not based upon citizenship; it was based upon administrative due process and adjudication of issues properly before the agency. The Government states that the pilots have a mere "limited occupational privilege." The Government, similarly ignoring 49 U.S.C. § 44709, and the administrative due process provided in the statute and in the APA when a license is revoked, cites no support for this proposition and has mischaracterized the rights of the pilots. (See discussion of *Pastrana supra p 3.*)

In *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001), the D.C. Circuit stated that an alien, who "acquires or holds property in this country may invoke the protections of the Constitution when the property is placed in jeopardy by government intervention." *Id.* at 204 *citing Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491-492 (1931).

In *Sardino v. The Fed. Reserve Bank of New York*, 361 F.2d 106, 111 (2d Cir. 1966) *cert. denied* 385 U.S. 898 (1966), Judge Friendly citing *Russian Volunteer Fleet* wrote:

> The Government's second answer that "The Constitution of the United States confers no rights on non-resident aliens" is so patently erroneous in a case involving property in the United States that we are surprised it was made. Throughout our history the guarantees of the Constitution have been considered applicable to all actions of the Government within our borders -- and even to some

[1] While an intra circuit conflict exists, the conflict which needs to be resolved by the Court is the conflict between the Ninth Circuit and the D.C. Circuit in the case decided below.

without. Cf. *Reid v. Covert*, 354 U.S. 1, (1957). In *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931), the Court squarely held that an alien friend is entitled to the protection of the Fifth Amendment's prohibition of taking without just compensation -- even when his government was no longer recognized by this country. And the Court has declared unequivocally, with respect to non-resident aliens owning property within the United States, that they "as well as citizens are entitled to the protection of the Fifth Amendment."

The cases cited by the government do not involve property interests like FAA-issued licenses in the United States held by foreign citizens, but rather involve deportation hearings and the removal of aliens from the United States. In those cases, questions of due process often hinge on where the alien is located, but in the case at hand, the issue is the property right, not immigration status, and the due process rights accorded to any litigant by statute or the Constitution in a U.S. Court or U.S. administrative proceeding. Accordingly, the government's statement that "non-resident aliens have no due process right to be in the United States at all" is irrelevant. The pilots do not seek admission to the United States, but rather to be provided due process before their FAA certificates are revoked.

The Government contends that non-resident aliens do not have due process rights (Opposition at 12), a somewhat shocking declaration as applied to persons properly before a U.S. court or U.S. administrative agency involving a property or liberty interest. As discussed above, except perhaps in the immigration context, no decision of this Court or any circuit has ever so held.

The Government, in footnote 6, relies on a number of decisions of the Court relating to aliens abroad who claimed due process rights and constitutional protections, including *Johnson v. Eisentrager*, 339 U.S. 763 (1950). The holding in *Eisentrager*, which the Government relies upon, was greatly

limited by last year's decision of the Court in *Rasul v. Bush*, 124 S. Ct. 2684 (2004). *Rasul*, in petitioner's view, stands for the proposition that where the United States authority is in control, anyone, alien and citizen alike, is entitled to challenge the basis of his detention as an enemy combatant and whether he be a citizen or an alien, he has the absolute due process right to know the basis of the Government's charge (why, for example, he is deemed an enemy combatant) and the right to challenge it before an impartial adjudicator. Compelled by our Constitution, this is the way disputes are resolved in the United States, whether an alien or citizen's rights are at issue. The idea that an alien has no rights or fewer rights than a citizen is contrary to our Constitution and its promise of equal justice under the law.

Very recently, in a landmark ruling by the House of Lords, in *A and Others v. Secretary of State for the Home Department*, [2004] UKHL 56 (Dec. 16, 2004) *available at* http://www.parliament.the-stationary-office.co.uk/pa/ld200405/ldjudgmt/jd041216/a&others.pdf, a case was decided which involved a number of aliens detained as terrorists who wished to challenge their detention. Under United Kingdom statutes and the European Convention on Human Rights, the House of Lords, in several lengthy concurring opinions, held that in terms of rights secured under the Convention, citizenship is not relevant and that aliens and citizens have the same due process rights.

The recent House of Lords decision is aligned with the long precedent of this Court which has never discriminated against aliens and denied due process rights in proceedings in the United States.

The Government's view is wrong and this issue is one this Court, once again, should affirm.

III. The decision below eviscerates the procedural protections afforded by Congress in the APA and the Federal Aviation Act of 1958.

The pilots, in their petition, contend as they did in the Court below, that the Executive cannot "eviscerate" or displace an

Act of Congress. The Government's answer is essentially that the pilots "cite no case holding that either of those statutes afforded greater protection to non resident alien pilots." Opposition at 14. The pilots have sought "not greater protection," but simply the basic due process rights which Congress enshrined in the statute applicable to everyone equally, citizen and non-citizen alike.

When enacting the Federal Aviation Act of 1958, Congress specifically stated that an aggrieved certificate holder may appeal to the FAA, "where he will be given a full hearing complying in all respects with the requirements of the Administrative Procedure Act." H.R. REP. No. 85-2360 (1958). In accordance with the APA, the aggrieved party is entitled to due process. *See* 5 U.S.C. § § 553-559. No distinction is made based upon citizenship.

The Government contends that when Congress passed Vision 100 – Century of Aviation Reauthorization Act, Pub. L. No. 108-176, § 601, 117 Stat. 2561 codified as 49 U.S.C. § 46111, it ratified the existing FAA/TSA regulatory scheme for revoking certificates of non-resident aliens. This is not the case. First of all, the Vision 100 Act was passed long after the revocations involved in this case and is not the statute in question in this case. Secondly, even to the extent it could shed some light on congressional intent, 49 U.S.C. § 46111 is entirely silent as to the treatment of non-citizens. The Government cites a single line from a legislative history of the Vision 100 Act for the proposition that non-resident aliens have only the due process the TSA has given them in the regulations. The Government has made a huge leap of logic that the silence of the Act strips the petitioners of all APA protections and that indeed presumably the TSA is not bound by the APA. Petitioners contend that the TSA is bound by the APA and that nothing in the new Vision 100 Act states otherwise.

The Government in its Brief seems to recognize the dubious proposition that the TSA and FAA by regulation could

displace or supercede an act of Congress. It contends that a later law, Vision 100 (which has nothing to do with this case) "ratified the very regulatory process that petitioners challenge." Opposition at 15.

Leaving aside the questionable proposition that Congress can ratify aberrant regulatory action, the Government points not to the language of Vision 100 which is silent on the due process rights of non-citizens, but to a line in the legislative history of the act. The thrust of the Government argument is essentially that Congress (probably at the urging of the TSA because of this case) has given "hearing" rights to citizens but not to non-citizens, and, says the Government, therefore non-citizen pilots do not have due process rights at all (even the core rights of notice and opportunity to challenge the basis of the Government's action).

Whether Congress has done this and can do this, in light of the due process guarantees of the U.S. Constitution and its promise of equal justice for all, is an issue for another day. The issues Petitioners bring to the Court are unaffected by what Vision 100 did or what the Government claims it did.

The reasons Petitioner has given why the Writ should be granted remain valid despite the summary response of the Government.

CONCLUSION

Wherefore, for the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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